

REMARKS

The following issues are outstanding in the pending application:

- Claims 3, 10-11, 14, and 19-20 are rejected under 35 USC 112;
- Claims 1 and 16 are rejected under 35 US 102; and
- Claims 17-19 and 20 are rejected under 35 USC 103.

Claim Amendments

Claim 1, 16, and 20 are amended herein to include limitations of claim 5. Claim 5 is canceled. Amended independent claims 1, 16, and 20 now recite “two or more additional adjustment openings, said additional adjustment openings being arranged so as to be staggered in the circumferential and axial directions, said additional adjustment openings being arranged such that, in different turning positions of said adjusting member relative to the tube portion, said first and at least one of said additional adjustment openings overlap at least partially to define different overflow levels or do not overlap and close the overflow.” Claims 3, 10, 11, 14, and 19 are amended to delete wording that could be interpreted as indefinite and to correct antecedent basis. Claim 21 is new and finds support throughout the specification and at least in Fig. 6 Applicant asserts no new matter is entered.

35 USC 112

Claims 3, 10-11, 14 and 19-20 are rejected by the Examiner under 35 USC 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.

Claim 3 was rejected for reciting the limitation “each case” with insufficient antecedent basis. Since Claim 1, from which claim 3 depends, recites that there are two or more additional adjustment openings, “each case” now has proper antecedent basis to each additional adjustment opening. Claim 10 was rejected for reciting the phrase “especially a ceramic material.” This phrase has been deleted from claim 10. Claims 11 and 19 were rejected for reciting the phrase “in particular.” This phrase has been deleted from claims 11

and 19. Claims 14 and 20 are rejected as reciting the phrase “especially.” This phrase has been deleted from claims 14 and 20. Given the claim amendments, Applicant respectfully requests withdrawal of the rejection.

35 USC 102

Claims 1-15 are rejected under 35 USC 102(b) as being anticipated by U.S. Patent No. 2,266,043 (“Hutchins”). Applicant notes that claim 16 is referred to in the text of the rejection. As such, the Applicant will consider claim 16 to be rejected under section 102(b) also. Applicant respectfully traverses.

Hutchins describes a portable device that is adapted to be positioned over the drain opening for controlling the flow of liquid into the drain. The device comprises a base portion, and a hollow column which is frictionally attached to the base member in a fluid-tight relation. The column has a lateral discharge opening or window adjacent to its lower end. The column may optionally have a lateral overflow opening adjacent to its upper end. The base member also has a window in the side of it which is substantially the same shape and dimension of the window in the column. The column may be rotated to bring the window of the base portion and the lower window of the column portion into alignment to make a discharge passage into the column. The size of this discharge passage may be made larger or smaller laterally to control the rate of flow by rotating the column. Hutchins teaches that having the windows positioned closely adjacent to the bottom of the sink is highly advantageous as it washes heavy particles and foreign matter out through the discharge window. The device may also function as a sink stopper by rotating the column so that the column window and base window do not overlap.

A claim is anticipated only if each and every element as set forth in the claim is found either expressly or is inherently described in a single prior art reference. *Verdegaal Bros. v Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Applicant respectfully submits that nowhere does the Hutchins reference teach “two or more additional adjustment openings, said additional adjustment openings being arranged so as to be staggered in the circumferential and axial directions, said additional adjustment openings being arranged such that, in different turning positions of said adjusting member relative to the tube portion, said

first and at least one of said additional adjustment openings overlap at least partially to define different overflow levels,” as given in amended independent claims 1 and 16.

Applicant notes that the Examiner has cited Hutchins figures 3, 4, and the top of figure 2. However, these figures do not demonstrate the limitation that the openings are staggered in the circumferential and axial directions, or the limitation that these openings can be adjusted to define different overflow levels when they overlap, or no over flow levels. For example, element 4 in these figures, to which the Examiner seems to be referring to, has no mechanism to discontinue flow. Further, element 4 is not staggered in the circumferential direction with respect to opening 7. If the Examiner is not referring to element 4 as teaching the additional adjustment openings, the Applicant respectfully requests clarification on which element in each figure the Examiner considers to teach this limitation.

Applicant respectfully asserts that since Hutchins fails to teach or suggest each and every limitation of the presently amended independent claims 1 and 16, a rejection under 35 U.S.C. 102(b) cannot be sustained. Since dependent claims 2-15 depend at least in part on amended independent claim 1, they by definition are not anticipated by the Hutchins reference. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the outstanding rejection of claims 1-16 under 35 USC 102 as having subject matter anticipated by U.S. Pat. No. 2,266,043 to Hutchins.

35 USC 103

Claims 17-19 are rejected by the Examiner under 25 USC 103(a) as being unpatentable over Hutchins in further view of DE Patent No. 20213719 (the “German patent”). Applicant notes that DE Patent No. 20213719 has not been officially cited as prior art on PTO form 892. Applicant respectfully traverses.

Hutchins was previously described above. The Examiner has cited figures 1-14 of the German patent as provided elements of the claims. However, the Applicant can only find four figures in the German patent. As the German patent is written in the German language, only the four figures are described herein. Figure 1 of the German patent appears to be a rectangular storage platform. Figure 2 appears to be a drain. Figure 3 appears to be three storage platforms one above the other with four vertical rods in each corner. Applicant notes

that the figure does not detail how the platforms are attached to the vertical rods. Figure 3 appears to be two parallel sides connected by a perpendicular side, with a notched protrusions off of each parallel side.

Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), controls the consideration and determination of obviousness under 35 U.S.C. 103(a); *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734-35, 167 L. Ed. 2d 705, 715 (U.S. 2007). The four factual inquires enunciated therein for determining obviousness are: (1) determining the scope and contents of the prior art; (2) ascertaining the differences between the prior art and the claims in issue; (3) resolving the level of ordinary skill in the pertinent art; and (4) evaluating evidence of secondary considerations.

In this case, neither the level of ordinary skill in the art, nor secondary considerations are at issue. However, in order to assess the scope and content of the prior art properly, a thorough understanding of the invention must be acquired by studying Applicant's claims and the specification. M.P.E.P. § 2141. Thus, the inquiry begins with construction of Applicant's claims, explained below. Next, when ascertaining the differences between the prior art and the claims at issue, both the invention and the prior art references as a whole must be considered, and *all* claim limitations must be considered when determining patentability of Applicant's invention. M.P.E.P. §§ 2141; 2143. When this is properly done in this case, as shown below, it becomes clear that differences exist that preclude obviousness. And finally, the test for obviousness requires identification of a reasonable basis for combining the claimed elements in the claimed fashion. *KSR*, 127 S. Ct. at 1741; M.P.E.P. §2143. As shown below, these requirements are not met in this case, and no *prima facie* case for obviousness is made.

Applying the proper test to this case begins with amended independent claims 16 and 20 that require two or more additional adjustment openings, the additional adjustment openings being arranged so as to be staggered in the circumferential and axial directions and in different turning position of the adjusting member relative to the tube portion, said first and at least one of said additional adjustment openings overlap at least partially to define different overflow levels. As described in the anticipation section above, Hutchins at least does not account for two or more additional adjustment openings, said additional adjustment openings

being arranged so as to be staggered in the circumferential and axial directions. Neither does the German patent appear to account for this limitation. Since not all of the instant claim limitations have been accounted for in the cited art, a *prima facie* case of obviousness has not been made. As such, Applicant respectfully requests withdrawal of the rejection.

Claim 20 is rejected under 35 USC 103(a) by the Examiner as being unpatentable over Hutchins in further view of the German patent.

Applicant respectfully submits that the previous discussion of the patentability of the current invention over the Hutchins and German patent references obviates this rejection. Neither Hutchins nor Hutchins in further view of the German patent accounts for all of the limitations of claim 20. As such, Applicant respectfully requests withdrawal of the rejection.

CONCLUSION

Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 06-2375, under Order No. HO-P03260US0 from which the undersigned is authorized to draw.

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Respectfully submitted,

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